

<b>INTEGRATED VEGETATION AND INSECT</b>	)	<b>AGBCA No. 2005-171-1</b>
<b>MANAGEMENT, INC.,</b>	)	
	)	
Appellant	)	
	)	
<b>Representing the Appellant:</b>	)	
	)	
Ken Davis, President	)	
Integrated Vegetation and Insect	)	
Management, Inc.	)	
P.O. Box 494	)	
Upper Lake, California 95485-0494	)	
	)	
<b>Representing the Government:</b>	)	
	)	
Susan B. Altman, Esquire	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery Street, 17th Floor	)	
San Francisco, California 95988	)	

### **DECISION OF THE BOARD OF CONTRACT APPEALS**

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June 8, 2006  
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**Before POLLACK, VERGILIO, and STEEL<sup>1</sup>, Administrative Judges.**

**Opinion for the Board by Administrative Judge VERGILIO.**

On September 20, 2005, the Board received from Integrated Vegetation and Insect Management, Inc. of Upper Lake, California (contractor) a notice of appeal asking that its contract be reinstated, thereby contesting the termination for default of its contract, No. 53-9A28-4-1H55, with the U. S. Department of Agriculture (USDA), Forest Service (Government). Under the contract, the contractor was to provide vegetation treatment in the Upper Lake Ranger District of the Mendocino National Forest in California. After questioning the contractor's inadequate rate of progress and issuing cure notices and obtaining responses, the contracting officer based the termination for default

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<sup>1</sup> Administrative Judge Steel, of the Department of Interior Board of Contract Appeals, sits by designation of the Secretary of the Department of Agriculture.

upon the contractor's continued failure to make progress. The contracting officer made the determination after the contractor had failed to meet contract deadlines for completing line items and had not provided assurances that it could complete performance in a timely manner.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The parties have submitted the case for decision based upon the written record, without a hearing on the merits. Rule 11. The evidentiary record is the appeal file.

The Board concludes that the Government properly issued the termination for default. The Government has met its burden of proof in substantiating the default. The contractor did not complete the performance of line items within the agreed upon schedule and had failed to achieve and sustain a rate of performance that would ensure timely completion; the contractor provided no reasonable assurance that it could perform within an acceptable time. The contractor has not demonstrated that its failure to perform arose from unforeseeable causes beyond its control and without its fault or negligence. The contractor has not demonstrated that its personal, financial, and legal difficulties prior to termination were the cause of the slow rate of progress. The contractor utilized inadequate equipment and insufficient personnel to accomplish the contractual tasks; it failed to demonstrate an ability and commitment to perform in a timely manner. The Board denies the appeal.

### **FINDINGS OF FACT**

#### **The solicitation and contract**

1. The Government engaged in a negotiated procurement to obtain vegetation management (tree, brush and slash removal to achieve healthy forests, hazardous fuel reduction, and wildlife habitat objectives) on selected areas of the Upper Lake Ranger District of the Mendocino National Forest, in Lake County, California. (Exhibit 2 at 3, 4, 15 (¶¶ C.1.1, C.1.2) (all exhibits are in the appeal file)).

2. The solicitation specifies, for the three line items here relevant, the acreage, basis of pricing, period for completion after issuance of the notice to proceed, and the work to be performed:

<u>item</u>	<u>acres</u>	<u>pricing</u>	<u>completion</u>	<u>brief description of work</u>
1	104	acre	6 months	tree thinning; release and slash treatment
4	20	job	2 months	brush mowing treatment
5	250	acre	15 months	tree thinning; release and slash treatment

(Exhibit 2 at 5-6, 35 (¶ F.2, Contract Time), 15-31, 60-63.) In addition to specifying the period within which work is to be completed, the solicitation states that the contractor shall maintain progress at a rate that will assure completion within the contract time (Exhibit 2 at 35 (¶ F.2, Contract Time), 36 (¶ F.6, Contract Progress)).

3. Among the clauses incorporated by reference is the Default (Fixed-Price Construction) (APR 1984) clause, 48 CFR 52.249-10:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(Exhibit 2 at 43 (¶ I.1).)

4. The solicitation includes the Central Contractor Registration (CCR) (OCT 2003) clause, 48 CFR 52.204-7. The CCR database is the primary Government repository for contractor information required for the conduct of business with the Government. (Exhibit 2 at 43 (¶ I.2(a)).) Additionally,

The Contractor is responsible for the accuracy and completeness of the data within the CCR database, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. To remain registered in the CCR database after the initial registration, the Contractor is required to review and update on an annual basis from the date of initial registration or subsequent updates its information in the CCR database to ensure it is current, accurate and complete. Updating information in the CCR does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

(Exhibit 2 at 45 (¶ I.2(f)).) The solicitation incorporates the Payment by Electronic Funds Transfer -- Central Contractor Registration (OCT 2003) clause, 48 CFR 52.232-33 (Exhibit 2 at 43 (¶ I.1)). The clause states, that (except as otherwise provided) all payments by the Government under the contract shall be made by electronic funds transfer (EFT). The Government shall make payment to the contractor using EFT information contained in the CCR database. Further,

(e) Liability for uncompleted or erroneous transfers.

(1) If an uncompleted or erroneous transfer occurs because the Government used the contractor's EFT information incorrectly, the Government remains responsible for--

- (i) Making a correct payment;
- (ii) Paying any prompt payment penalty due; and
- (iii) Recovering any erroneously direct funds.

(2) If an uncompleted or erroneous transfer occurs because the Contractor's EFT information was incorrect, or was revised within 30 days of Government release of the EFT payment transaction instruction to the Federal Reserve System, and--

- (i) If the funds are no longer under the control of the payment office, the Government is deemed to have made payment and the Contractor is responsible for recovery of any erroneously directed funds; or

- (ii) If the funds remain under the control of the payment office, the Government shall not make payment, and the provisions of paragraph (d) of this clause shall apply.

5. Integrated Vegetation submitted a proposal that identifies particular pieces of equipment and specifies for each that it either will be, or could be, used on the contract (Exhibit 2 at 7-8). In a pre-award clarifying discussion with the contract specialist, the president of Integrated Vegetation indicated that the company employs two additional operators and has a standing arrangement with a local company to subcontract additional work if necessary (Exhibit 3 at 110). In pricing its proposal and best and final offer, Integrated Vegetation priced each line item. In response to the notation, "Those contractors wishing to limit their offers to less than all items shall indicate below any limitations on their offers," it specified: "Please consider: Award just one item of all items except for Item 4 which can be added to items 1 through 5. Example: Award item One or One and four, item two or two and four, item 3 or item 3 and four, item five or five and four. I could handle item One and item two together." (Exhibit 2 at 6, 90.)

6. By letter dated September 15, 2004, the contracting officer informed Integrated Vegetation that it is "hereby awarded items 1, 4 & 5 of the above referenced solicitation in response to your Best and Final Offer dated 9/15/2004." The contract price is \$173,914. (Exhibit 3 at 111.) At the pre-work meeting, held on October 14, 2004, the contractor signed an agreement to perform the three line items and the notice to proceed; at that time, the contractor did not take exception to the award of the three line items. The Government specified that contract time begins on October 18, 2004. (Exhibit 3 at 117, 124, 128.) The contract incorporates the terms and conditions of the solicitation specified in the above findings of fact (Exhibit 2 at 2-88).

7. With the stated beginning of contract time, work was to be completed no later than the following dates (Finding of Fact (FF) 2):

line item 1	April 18, 2005
line item 4	December 18, 2004
line item 5	January 18, 2006

#### Performance

8. In November 2004, the contractor worked on areas within item 1, but did not complete any area (Exhibit 4 at 236-39). Within the first month of the contract period, the contractor was not making sufficient progress to complete any item within the scheduled period. The Government informed the contractor of its concerns regarding the progress being made. As stated in the contract daily diary for October 16, 2004, the contracting officer's representative told the contractor's president that item 4 had a contract time of 60 days and that almost half of that period had elapsed without any performance on the item. (Exhibit 4 at 239.) The contracting officer's representative's report in the contract daily diary for November 17, 2004, states in pertinent part:

[The contractor's] work since starting about a month ago has been confined to hand work only which has contributed very little to the completion [of] any blocks. The substantial work remaining is waiting on introduction of the masticating equipment. The arrival time of his equipment keeps slipping back and I am concerned that completion on Item 4 will not happen before LOP [Limited Operating Period] restrictions come into effect. Ken [the contractor's president, owner and principal worker] has asked for a time extension of completion of this item. I can only recommend extending Item's contract time until December 31, 2004 (13 days extra) because of the LOP starting 1/1/2005 and the possibility that funding for this particular item may be pulled if work is not accomplished in calendar year 2004.

(Exhibit 4 at 240.)

9. Progress continued slowly, that is, at rates that would not ensure completion of item 4 within the prescribed period. The contractor was not utilizing machinery needed for the work. (Exhibits 3 at 138, 4 at 243 (Dec. 6, 2004, "Work on Item 4 is way behind schedule. Contractor has not done enough work to access the acceptability of the work"), 245 (Dec. 13, 2004, machine not yet on site; contractor "is almost out of contract time for Item 4, and it appears that he will not finish this item within the allotted time."); 246 (Dec. 15, 2004, "It now seems that [the contractor's] machine will not arrive until the contract time expires for Item 4").)

10. By letter dated February 7, 2005, the contracting officer informed the contractor that it had failed to complete a line item within the contract-prescribed period and of its failure to make sufficient progress. The letter notes the contractor's work schedule (accepted by the Government) for each of the three line items. It states:

Unfortunately, none of these milestones have been met. Based on your failure to comply with your own schedule we have determined you are not in compliance with the contract. Below are the facts regarding your performance and causing concern regarding your ability to complete your contractual obligation.

1. Line Item 1 (High Glade) contract time is 6 months and you accomplished minimal hand work on this project to date. The limited Operating Period began for this project on February 1 and no further work may be attempted until July 10, 2005. Weather conditions for this site were favorable until late December.
2. Line Item 4 (Wildlife Brush Mowing) contract time was for 2 months and has now expired. During that time weather conditions permitted full operations and the Government representatives cautioned you regarding the length of time you had available and the fact that a Limited Operating Period would begin on January 1, 2005 for this

item. You accomplished no work on this unit. Weather conditions for this site were favorable during this time.

3. Line Item 5 (Willow Creek) contract time is 15 months and you just began work on this site within the last few days. While this location has no Limited Operating Period, soil conditions have only recently changed to allow for work to be accomplished, but this may be temporary depending on weather conditions. However, weather conditions for this site were favorable until late December.
4. You repeatedly told the Contracting Officer Representative . . . that your equipment would arrive at the work site starting on November 1, 2004 and continuing for over 2 months until the equipment finally arrived on January 26, 2005. In addition, statements you made to the COR indicate that you are having financial difficulties in regard[ to] your equipment. This situation creates a cause for concern that you do not have the financial capacity to perform this contract.

Notwithstanding the conditions cited above, the Government's primary interest is to accomplish and successfully complete the contract in a timely manner. Therefore, a written plan describing a realistic remedy of the current situation and how you plan to complete the contract is required. Your plan shall have sufficient detail regarding your capacity to perform the work, a proposed schedule to remedy the situation, and your planned completion dates for each item.

(Exhibit 3 at 141-42.) The letter required a response within 7 calendar days of receipt (Exhibits 3 at 142, 4 at 252). The contractor did not provide a timely response, prompting the contracting officer to issue another letter (Exhibit 3 at 151). The contractor's response of February 24, 2005, does not indicate that the work could be accomplished as required under the contract (Exhibit 3 at 153-55).

11. Performance continued at an unacceptably slow rate; that is, one that would not achieve contract completion within the established time frames. (Exhibit 4 at 257, 260-65.) The contractor explained to the contracting officer the various mechanical problems of the masticating machine; the contracting officer again noted concern regarding the inadequate rate of progress (Exhibit 4 at 264). On March 17, 2005, the Government issued to the contractor a notice of noncompliance, noting that the contractor had fallen behind its work plan and progress schedule, and had not achieved a work progress rate that would assure completion within the contract time (Exhibit 4 at 266).

12. The contracting officer issued a cure notice on March 28, 2005, stating in part:

Progress made to date is not only unacceptable, but does not follow the technical proposal submitted by Integrated Vegetation & Insect Management from which the contract award was based on.

Mr. Davis [the contractor's president and primary worker on this contract], it is my desire that this contract be completed successfully by your firm. However, I believe the fact that the equipment and personnel as promised under the terms of your technical proposal [are] not being provided has contributed to the less than satisfactory progress rate. The fact that the one piece of equipment on-site appears not designed for this type of work has compounded the problem.

(Exhibit 3 at 160-61). The contractor responded, and continued with performance. (Exhibits 3 at 164-69, 171, 4 at 271-76).

13. On April 7, 2005, the Government made payment of \$3,800 to the contractor for 8 acres satisfactorily completed under line item 5 (Exhibit 5 at 307-08).

14. On April 14 or 18, 2005, the contractor completed line item 4; this was untimely according to the contractor's latest schedule that indicated April 4 as the completion date for this line item and the resumption date for work on line item 5 (Exhibits 3 at 174, 4 at 277, 309). On April 19, 2005, the Government made payment of \$8,000 to the contractor for line item 4 (Exhibit 5 at 309-10).

15. On April 20, 2005, the contractor received a notice of non-compliance (for inadequate rates of performance) (Exhibit 4 at 278) and correspondence from the contracting officer. The contracting officer expressed concerns regarding the inadequate rate of performance, stating in pertinent part:

To date, responses to my correspondence have not addressed how you intend to cure your lack of progress, nor to date, have you employed any methods to insure timely contract completion. **Please respond to the following questions by April 29, 2005.** . . . As explained in previous correspondence, February 7, 2005, February 17, 2005; and March 28, 2005, your progress rate is unacceptable, your prosecution of the work does not reflect your technical proposal, and it appears that one piece of equipment that is on site is not suitable for the work as required by this contract.

(Exhibit 3 at 174). The contracting officer sought specific information regarding the contractor's intended work force, use of equipment, and any arrangement with a subcontractor, as well as an updated progress schedule. The contractor provided responses (Exhibit 3 at 175-77, 180). The contracting officer's representative reached the conclusion, and so informed the contracting officer, that the contractor could not satisfy its proposed schedule: "I think his time expectations are unreasonable for the equipment he has proposed. A prudent and efficient operator would have a hard time completing the 210 acres in 2 months using three masticating machines." (Exhibit 3 at 178.) The contractor had been unable to sustain the rate of performance it was proposing.

16. By letter dated May 19, 2005, the contracting officer accepted the latest proposed progress schedule submitted by the contractor. The acceptance identifies specific conditions that the contractor must satisfy, given that the performance time had already expired for completing item 1 and the existing rate of progress would not result in a timely completion of line item 5 (FF 7):



Based on your progress schedule, I have the following expectation. There are approximately 230 acres remaining in Item 5. Your progress schedule stated that you would have Unit 5 completed by July 15, 2005. This means that by working 52 days (May 25, 2005 to July 15, 2005) you must complete a minimum of 4.42 acres per day.

Further you stated that you would start Item 1 on July 15, 2005[,] and complete on September 15, 2005.

I believe the Government has been patient and understanding in regards to the hardships (machine breakdowns, etc) you feel you have encountered in accomplishing this project. I have requested [the contracting officer's representative] to calculate your progress on June 30, 2005. If significant progress has not been made, (a minimum 4.42 acres a day), I will proceed with default termination.

(Exhibit 3 at 183.)

17. The contractor informed the contracting officer on June 7, 2005, of its various difficulties. It noted that it recently learned that all of its money had been taken, such that the contractor had no money with which to work. (Exhibit 3 at 184.) A letter dated June 20, to the contracting officer, from counsel for the contractor, states that the contractor "is recovering from the financial devastation caused by his wife taking all of the funds from his corporate accounts without permission. These takings include the payments made to his account for [this] contract[.]" (Exhibit 3 at 186.)

18. The Government determined that as of June 30, 2005, the contractor had completed 23 acres in item 5 out of the 250 acres. On that date the contracting officer's representative informed the contracting officer that the contractor's "production is still on the low side, doesn't seem [to] average over 1 acres per day." (Exhibit 3 at 187.) Even at its best rate to date, the contractor could not complete performance within the contractual or scheduled completion dates, given the equipment and manning considered and utilized by the contractor.

19. As of July 25, 2005, the contractor had completed work as follows:

<u>item</u>	<u>acreage</u>	<u>completed</u>
1	104	0
4	20	20
5	250	27

(Exhibits 3 at 190, 5 at 307, 309, 311).

Termination and post-termination

20. By letter dated July 25, 2005, the contracting officer informed the contractor that the contract was terminated for default, effective immediately, stating that the “result of your continued failure to make progress in completing the contract has led to my decision to terminate your contract per the Default Clause” (Exhibit 3 at 191).

21. After the termination for default, at the request of Department of Labor officials, the Government withheld a portion of the payment under the final invoice for work completed. The request indicates the basis for the withholding (pending final resolution): the allegation that the contractor violated the Service Contract Act by not paying employees wages and fringe benefits as required by that Act. (Exhibit 3 at 213-14.)

22. By letter dated September 14, 2005, the contractor filed a notice of appeal with this Board, asking that the contract be reinstated, implicitly challenging the validity of the default determination. The contractor stated that its CCR information was changed. The contractor noted that its “machine is a proto type and is a low ground pressure and very powerful cutter” capable of performing the contract work. The contractor indicated that no downtime was given despite the “wettest winter-spring since 1960.” Further, the contractor stated that its final invoice remains unpaid. (Exhibit 3 at 218-19.)

23. On September 15, 2005, regarding the final invoice, the Government confirmed to the contractor that payment (less the withholding requested by the Department of Labor) had been made and electronically deposited (Exhibits 3 at 230, 5 at 316).

24. The evidentiary record does not demonstrate that the Government was involved in changing the contractor’s information in the CCR database so as to affect the initial two payments preceding the termination for default. The contractor expressly recognizes that it does not assert that the Government made changes to the CCR database (Contractor’s Reply, Nov. 21, 2005, at 2 (¶ 4)).

25. Assuming that an erroneous transfer of a payment(s) occurred, the record does not demonstrate that the Government used the contractor’s EFT information incorrectly, but rather that such erroneous transfer occurred because the contractor’s EFT information was incorrect. The funds are no longer under the control of the payment office. (FF 13, 14, 23.)

26. Prior to June 7, 2005 (when the contractor designated an attorney) (Exhibit 3 at 196-97; FF 17), the contractor did not designate an authorized representative to act on behalf of the contractor in the absence of the contractor’s president/owner. However, at the post-award/pre-performance meeting, the contractor provided the Government with the name of the wife of the president/owner. (Exhibit 3 at 118.) The record contains instances of e-mail communications between the Government and the named wife (Exhibit 3 at 146 (Feb. 7, 2005, an inquiry regarding how to accomplish an assignment of funds to pay off a business loan), 147 (Feb. 8, 2005, a Government response indicating that assignment requires a specific form that must be notarized), 147 (Feb. 10,

2005, a request for the Government to begin on the paperwork necessary for an assignment), 172-73 (Apr. 18, 2005, regarding payment of the first invoice)). None of this information could only be communicated to a specifically authorized representative. The contractor was aware of at least some of her contacts surrounding this contract. As detailed in a contract daily diary, the contractor's owner "said that his wife did receive the fax that [the contracting officer's representative] sent, and he would get the specifics from her so that he could provide us the documents next week." (Exhibit 4 at 238 (Nov. 10, 2004).) The contractor has not suggested, or offered factual support, for the conclusion that the initial communications between the named individual and the Government occurred without the contractor's knowledge or support, or that the contractor instructed the Government to cease communications with the individual prior to these communications. The evidentiary record does not suggest or demonstrate that any of these communications were improper or affected the contractor's ability to perform the contract.

27. Although the contractor raises delay due to wet weather as a basis excusing its inadequate rate of performance and the default, the record does not support the conclusion. The conditions were often wet, and days and portions of days were not suitable for work. However, the contractor has not developed the record to demonstrate that the downtime due to weather was other than what a reasonable contractor would have anticipated or that any excusable delay would have resulted in a material extension of time beyond that already permitted by the Government. Just as significantly, as demonstrated by the contract daily diaries, on many days the contractor's equipment was in disrepair, such that the weather did not delay performance to a material extent. (Exhibit 4 (contract daily diaries).) The contractor did not achieve a rate of performance during good weather that would have enabled it to complete the contract during the remaining time for completion; that is, the weather was not a factor in determining the unacceptably low rate of performance.

28. Based upon the record, the contractor was unable to sustain a rate of performance that would permit completion within the remaining contract period. This failure was due to the contractor's selection of equipment and manning levels. The contractor offered and supported no remedy to attain an adequate rate of performance. The contractor could not have improved its rate of productivity to satisfactorily complete performance, given its determination to utilize its prototype machine. With the machine operable, the contractor never achieved a sufficient rate of performance, as revealed and un rebutted in the contract daily diaries (Exhibit 4 at 298 (with approximately 3 days of work, the contractor completed 1 to 2 acres), 299 ("His machine has work[ed] about 6 days without a breakdown, [t]he longest run I seen since he has been on this contract. Production during this period has been only between 1/2 and 3/4 acres per day.")). The machine was not capable of achieving a rate of production that would enable the contractor to complete the remaining 327 acres within the contractual period.

29. Prior to the default determination, the contractor lacked, or failed to utilize, equipment, personnel and subcontractors, that would achieve and sustain a rate of performance that would ensure timely completion. Despite repeated requests for assurances from the contracting officer, and the contractual requirement that the contractor is to maintain a satisfactory rate of performance (FF

2), the fully developed record reveals no such assurances. The actual performance attained demonstrates an inability to complete performance in a timely manner.

30. After the evidentiary record closed, the contractor submitted to the Board various documents regarding its dispute with the United States Department of Labor, said to concern two individuals who assisted the contractor under this contract. Because these matters arose after the termination for default, and cannot be said to have impacted the ability of the contractor to perform, and could not have been considered by the contracting officer at the time of the default determination, the Board does not consider this material.

### DISCUSSION

The contractor challenges the Government's termination for default of the underlying contract. The Government bears the initial burden of proof to demonstrate that the contractor was in default. Thereafter, the contractor bears the burden of proof to demonstrate that its default was excused.

#### The termination for default

A stated reason for the default determination is the lessor's failure to make progress, with that lack of progress endangering performance. As the Federal Circuit has directed, the test formulated in Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987), controls the determination of whether the Government justifiably default terminated a contractor for failure to make progress. The court states, "In applying that standard, we have required that the contracting officer's termination decision be based on tangible, direct evidence reflecting the impairment of timely completion. In other words, a court's review of default justification does not turn on the contracting officer's subjective beliefs, but rather requires an objective inquiry." McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (citations omitted). "Thus, the trial court should focus on the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had a reasonable belief that there was no reasonable likelihood of timely completion." McDonnell Douglas, 323 F.3d at 1017.

The contractor here accepted an award of three line items (FF 6). The contractor failed to achieve a rate of performance that would result in timely completion of a line item (FF 9-11, 14-15). In May, the Government accepted the revised project schedule submitted by the contractor. This required the completion of line item 5 by July 15 and of line item 1 by September 15 (the contractor had failed to complete line item 1 within the contract period). An express condition of the acceptance was that the contractor make significant progress by June 30, 2005. (FF 7, 16.) The contractor did not make significant progress by June 30 (FF 18).

At the time of the termination the contractor had failed to complete line item 5 within the time frame established in its progress schedule. The contractor had not achieved and sustained a rate of performance that would result in completion before the entire contract period expired. (FF 16, 18-19, 28-29.) The contractor provided the Government with no assurance that it could complete the

contract within an acceptable period. Considering the record, including the contractor's performance through the time of default, and its determined utilization of its prototype machine, there was no reasonable likelihood that the contractor would not have timely completed performance.

Specific concerns raised by the contractor

In seeking to demonstrate that its default was excusable, the contractor set forth its view of the case and proposed resolution during a telephone conference. The contractor maintains that its case may be resolved in its favor by answering five questions. It propounded the questions and, for each, it supplied the response it deemed compelled by the circumstances.

- (1) Was there a contract? Yes.
- (2) Did the contractor provide the Government with a consent form for others to conduct business on behalf of the contractor? No.
- (3) Were cures to be made? Yes.
- (4) Did the Government conduct business with other than the contractor and Mr. Davis? Yes.
- (5) Did the Government pay invoices to other than the contractor or Mr. Davis? Yes.

Additionally, the contractor contends that it never gave the Government information to authorize or complete an electronic deposit of payments under the contract. The contractor asserts that, because there was no contractor consent to make electronic payments, the Government failed to pay the contractor directly; without such payments, the contractor was unable to finance further performance under the contract. The contractor concludes that the Government remains liable to make payments to the contractor pursuant to the contract. (Memorandum of Telephone Conference Dec. 7, 2005).

The record and findings of fact demonstrate that the questions are not all answered as proposed by the contractor. There was a contract. The Government's notice of award regarding the three line items was an offer that the contractor accepted at the time of the pre-performance meeting (FF 6). Its subsequent performance on each line item (FF 8, 19) serves only to confirm independently that the award encompasses the three line items.

The contractor did not submit a consent form identifying an individual to conduct business on behalf of the contractor. However, the contractor provided the Government with the name of the then wife of the contractor's president/owner, who was aware of at least some of her actions. The record does not indicate that she conducted business on behalf of the contractor in her interactions with the Government involving this contract. (FF 26.)

Within the first month of performance, and often thereafter, cures were to be made. By the time of the termination for default, the contractor had failed to cure its unsatisfactory rate of performance, and offered no reasonable assurance that it could attain a satisfactory rate of performance.

As required under the contract, the contractor did provide the Government with information for electronic deposits of payments. To the extent that invoices were paid to other than the contractor, the record does not establish that the Government used the contractor's EFT information incorrectly, but rather it reveals that an erroneous transfer occurred because the contractor's EFT information was incorrect. The funds are no longer under the control of the payment office. Under the terms of the contract, the Government is deemed to have made payment and the contractor is responsible for recovery of any erroneously directed funds. (FF 4, 13, 14, 23-25.)

This contractor maintains that its default should be excused because of personal and financial difficulties arising without the fault or negligence of the contractor or its president. However, the record fails to demonstrate that the personal and financial troubles materially impacted the contractor's ability to perform prior to the termination or affected its ability to provide assurances that it could complete the contract in a timely manner. Difficulties with the machine that the contractor chose to utilize created on-going, unresolved delays and limitations upon the rate of performance. Specifically, even with the machine functioning, the contractor had not demonstrated that it could perform at a rate that would achieve timely, acceptable completion.

The Government terminated for default what remained under the contract. The contractor had failed to meet contract deadlines. It utilized inadequate resources to accomplish timely performance. It did not provide reasonable assurances that it would be able to increase and sustain a rate of performance to complete within an acceptable period. The unfortunate circumstances identified by the contractor do not constitute bases that must excuse its inadequate performance and default.

### **DECISION**

The Board denies the appeal; the termination for default is valid.

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**JOSEPH A. VERGILIO**

Administrative Judge

Concurring:

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**HOWARD A. POLLACK**

Administrative Judge

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**CANDIDA S. STEEL**

Administrative Judge

**Issued at Washington, D.C.**

**June 8, 2006**